Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CITY OF PINEVILLE, PETITIONER

v.

LIBERTY MUTUAL INSURANCE COMPANY, DENNIS STEPHENSON, TERRY M. CROY, GERALD ALAN CROY, KATHY STANLEY, TWYLA TANNER, BRIAN CROY AND CHRISTOPHER SIMS.

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF LOUISIANA COURT OF APPEAL, THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RANDALL B. KEISER
KEISER LAW FIRM LLC
P.O. BOX 12358
ALEXANDRIA, LA
(318) 443-6168

STACY C. AUZENNE
Counsel of Record
AUZENNE LAW FIRM, L.L.C.
P.O. BOX 11817
ALEXANDRIA, LA 71315-1817
(318) 880-0087

Attorneys for the Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court, the Court of Appeal and the Louisiana Supreme Court err in their decisions to allow a suit to go forward after the City of Pineville was made a defendant nearly three (3) years after the motor vehicle accident occurred, when the father of one of the plaintiffs testified that he observed an alleged dangerous condition in the roadway the day after the accident occurred?

   (a) Was the City of Pineville provided meaningful notice of a claim against them nearly three years after the accident occurred, and after the City entered into an intergovernmental agreement to overlay the road with asphalt prior to suit being filed against the City?

   (b) Were the City of Pineville's due process rights violated when they were not provided a meaningful opportunity to be heard in a reasonable amount of time after plaintiffs failed to name them as a defendant until nearly 3 years after the accident occurred, and one of the plaintiffs settled his claims against one of the originally named defendants?

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OPINIONS BELOW

The Reasons for Judgment of the 9th Judicial District Court rendered on May 6, 2003, is reprinted at App. p. 30a-39a. The decision of the Louisiana Third Circuit Court of Appeal affirming the trial court was rendered on March 2, 2005, is reprinted at App. p. 1a-29a, and is reported at 897 So.2d 834. The May 13, 2005, writ denial by the Louisiana Supreme Court of the City of Pineville's writ application is reprinted at App. p. 40a, and reported at 902 So.2d 1030.

JURISDICTION

The Louisiana Supreme Court denied the City of Pineville's writ application on May 13, 2005. This Petition for Writ of Certiorari is timely because petitioner has filed it within 90 days of May 13, 2005. The Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

Amendment XIV of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public

use, without just compensation.

STATEMENT

MAY IT PLEASE THE COURT:

This case involves a suit filed by Plaintiffs, the widow of deceased driver Wayne Croy, Terry M. Croy (hereinafter "Terry"); the children of Wayne Croy, Gerald Alan Croy (hereinafter "Gerald"), Kathy Stanley (hereinafter "Kathy"), Twyla Tanner (hereinafter "Twyla") and Brian Croy (hereinafter "Brian") collectively known as the Croy children; and the guest passenger of Croy's vehicle, Christopher Sims (hereinafter "Sims"). Named as defendants by the plaintiffs were the City of Pineville (hereinafter "City"), custodian of Bragg Street on the date of the accident, July 18, 1994; Dennis Stephenson (hereinafter "Stephenson"), the driver of the 1994 Ford Taurus that ran head on into the Croy vehicle; Hixson-Hopkins Autoplex of Alexandria, Inc. (hereinafter "Hixson"), the lessor of the 1994 Taurus; Connie and Patsy Lewis (hereinafter "Lewis"), the lessees of the 1994 Taurus; and Liberty Mutual Insurance Company (hereinafter "Liberty"), the insurer of the 1994 Taurus.

The Croy children first filed suit on September 21, 1994, naming Stephenson, Liberty, and an unknown insurer as defendants. The Croy children alleged that the sole cause of their father's death was Stephenson's negligent driving, excessive speed, inattentiveness and failure to maintain proper control of the 1994 Taurus. (Civil Suit 177,831 "F" R. p. 12-15) Sims filed suit on September 21, 1994, naming Stephenson and Liberty as defendants, and alleging that the sole cause of the accident was Stephenson's negligent driving, excessive speed, failure to maintain control of the vehicle, and

failure to take evasive action to avoid the accident. (Civil Suit 177,821 "B" R. p. 12-14)

Suit was initially filed by Terry on December 12, 1994, naming Liberty, Stephenson, Hixson, and the Lewis's as defendants. Terry's claims involved the damages she suffered when Wayne Croy was killed after running head on into Stephenson on Bragg Street in Pineville, Louisiana. The excessive speed and negligent driving of Stephenson were cited as the sole causes of the accident. (Civil Suit 178,614 "B" R. p. 12-17) The three separate suits were consolidated by Order dated January 30, 1995. (Civil Suit 177,821 R. p. 18-21)

On March 17, 1997, Sims filed a "First Supplemental and Amending Petition" adding defendants Stephenson and the City, alleging defects in Bragg Street, including its curve, alleged excessive speed of travelers over the posted 25 mile per hour speed limit, absence of shoulders, pavement drop off, overgrown vegetation over the street which concealed the approaching curve, and absence of warning or curve signs, all of which rendered it unreasonably dangerous. (Sims R. p. 117-122) The Croy children made similar allegations in an amended petition filed May 6, 1997, and Terry followed suit on July 23, 1997. (Croy Children R. p. 44-51 & Terry R. p. 59-66)

Sims alleged personal injury damages, medical special damages, lost wages and loss of earning capacity. (Sims R. p. 12-14) Terry alleged damages of loss of consortium, loss of love and affection and companionship, loss of services and support and future support, along with funeral and medical expenses. (Terry R. p. 12-17) The Croy children alleged wrongful death and survival damages, mental anguish and medical and funeral expenses. (Croy Children R. p. 12-15)

Sims settled for $10,000.00 with Liberty and Hixson on March 14, 1997, reserving rights to pursue his claims against the other defendants, and Liberty and Hixson were dismissed as to Sims only on April 29, 1997. (Sims R. p. 139-140)

The City filed an Exception of Prescription in all three consolidated cases on April 28, 1997, which was denied July 18, 1997, by the trial court (Sims R. p. 123-138 & p. 180-181) A writ was taken to the Third Circuit Court of Appeal, which was denied on September 12, 1997, and a writ to the Louisiana Supreme Court was likewise denied. (Sims R. p. 182-189, 202 & 203)

The City answered the original and amending and supplemental petitions of the plaintiffs, alleging that the sole causes of the plaintiffs' damages were the negligent acts of third persons, namely Stephenson, when he traveled on Bragg Street at speeds approaching sixty (60) miles per hour, and ran into Wayne Croy. (Sims R. p. 204-220) The City also alleged the statutory protections of the limitations on damages of La. R. S. 12:5106, the prohibition of jury trial of La. R.S. 13:5105, the limitation on legal interest of La. R.S. 13:5112, the limitations of liability on public bodies of La. R.S. 9:2798.1 and 9:2800, and the right to have the judgment structured according to La. R.S. 13:5114. (Sims R. p. 204-220)

Three separate motions for summary judgment were filed by Liberty, seeking to deny insurance coverage for Stephenson, and alternatively to declare the maximum coverage amount as being $10,000/$20,000. (Sims R. p. 35-41, 67-77, & 226-242) All three of Liberty's motions for summary judgment were denied. (Sims R. p. 65-66, 102-103 & 455)

The City attempted to obtain the Alexandria Police Department arrest jackets and Huey P. Long Hospital medical records of Kathy Stanley, which was

denied by the Trial Court. (Sims R. Vol. 2 p. 354-386) The City attempted to strike from paragraph 10 of the Croy children's Petition for Damages any claim for "hedonic damages", which was denied by the Trial Court. (Sims R. Vol. 2 p. 387-398)

Numerous motions to compel discovery and for protective orders were filed by all parties to this litigation. Supervisory writ applications were taken to the Court of Appeal, and the Louisiana Supreme Court. The City's attempt to third party the Rapides Parish Police Jury, (which deeded away Bragg Street to the City on April 7, 1953, by Ordinance Number 449) was dismissed by the Trial Court on the Police Jury's exception. (R. Vol. 3 p. 534-540, 554-555, 580, 588) The City also sought a protective order from the Court to prevent plaintiffs' counsel from conversing with current and former City employees, outside of the presence of undersigned counsel, which was denied.

The City filed a Daubert Motion to exclude the testimony of plaintiffs' accident reconstruction expert, Duaine Evans, which was denied. (R. Vol. 3 p. 622-630 700-702) The City also filed an Exception of Res Judicata, alleging that Sims had compromised his claims against them when he settled with Stephenson, which was denied. This matter was tried as a bench trial for all parties when Liberty failed to post its jury bond according to law, on December 3 through 6, 2002.

The Trial Court rendered written "Reasons for Judgment" on May 6, 2003, finding the City 50% liable and Dennis Stephenson 50% liable for the plaintiffs' damages, and awarded damages as follows:

Christopher Sims	Past Medicals	$32,018.43
	Future	

	Medicals	$ 75,000.00
	General Damages	$650,000.00
Croy Children:	Wrongful Death Damages	$40,000.00 each to Kathy Stanley Gerald Alan Croy and Twyla Tanner
	Total:	$120,000.00
Brian Croy	Wrongful Death Damages	$125,000.00
Terry Croy	Wrongful Death Damages	$125,000.00
Terry Croy	Pain & Suffering Wayne Croy	$100,000.00
Terry Croy	Economic Loss (Past & Future Lost Wages)	$156,494.00
Terry Croy	Property Damage	$100.00
Terry Croy	Special Damages (Funeral Expense)	$3,894.35
Total Damages:		1,387,506.78

City of Pineville (50% Fault)	$693,753.39
Dennis Stephenson (50% Fault)	$693,753.39
Liberty Mutual Insurance Company	$10,000.00
Coverage Settlement by Liberty with Christopher Sims	$10,000.00

(Sims R. Vol. 4 p. 854-859 & App. p. 30a-39a)

On March 2, 2005, the Louisiana Third Circuit Court of Appeal affirmed the Trial Court's decision, and reapportioned court costs to be paid 50% by the City of Pineville, and 50% by Liberty Mutual Insurance Company. (App. p. 1a-29a) Liberty requested rehearing on the apportionment of court cost issue, which was denied on April 20, 2005. The Croy children requested rehearing on the issues of the amounts of Liberty Mutual insurance coverage, apportionment of survival action damages amongst the children, and requested an increase in their damage award, which was denied on April 20, 2005. The City's writ application to the Louisiana Supreme Court was denied on May 13, 2005. (App. p. 40a) Still pending before the Louisiana Supreme Court are the Croy children's request for reversal of the trial court's

decision that Liberty' coverage only equaled $10,000.00, and for penalties and attorney's fees related to an alleged waiver of coverage claim. Also still pending at the Louisiana Supreme Court is Terry Croy's writ application seeking an increase in damages from the City and penalties and attorney's fees from Liberty based on the alleged waiver of coverage claim.

Statement of Facts

Christopher Sims, passenger in the 1974 Ford pickup truck driven by his cousin Wayne Croy, on July 18, 1994, gave a statement to Pineville Police Detective Don Field, and Officer Clyde Lemmons on July 19, 1994, regarding the facts of the accident. (Pineville Proffer #1)[1] Sims stated that he and his cousin were traveling toward Wayne Street, away from Louisiana Highway 107, at about 10:00 p.m., coming around the double curve headed toward the railroad tracks, when they first encountered a car traveling "real real fast" that went off the road on his side, and then jerked the wheel over straight in front of them, and slammed on his brakes. (Pineville Proffer #1 p. 2 & App. p. 41a) Sims stated that he and Wayne Croy

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[1]Pineville Proffer #1 is the statement of Christopher Sims taken by Det. Don Field and Off. Clyde Lemmons on July 19, 1994. Counsel for the Croy Children showed Off. Lemmons this statement during his direct examination and asked that he refer to it for an answer. As such, the proffer of Sims' statement should have been allowed introduced into evidence pursuant to La. Code of Evidence Art. 612(A), when used to refresh the witnesses recollection. (See R. Vol. 4 p. 1003-1004 and *State v. Taylor*, 688 So.2d 1262, 1270-71 (La. App. 3 Cir. 1997)

were so close to the other vehicle that they didn't have time to stop, and the front of the Croy vehicle struck the front of the other vehicle. Sims then saw someone running away from the scene of the accident. Sims stated that he and Croy had traveled to Jackson, Mississippi, that day, having left there to return home at 6:00 p.m. Sims did not see anything in the roadway that would have made the other vehicle go off the roadway, except that the driver "was going so f st he had to take both lanes" to come around the curve.(Pineville Proffer #1 p. 3 & App. p. 41a)

Sims stated that Croy did not have a chance to get off the roadway, except to slam on his brakes, but that they hit the other car "real hard". Sims stated that the road conditions were fair, with no shoulders, but that would not have created a problem if the other driver had been traveling the speed he should have been going. (Pineville Proffer #1 p. 4 & App. p. 41a) Sims stated that the road, Bragg Street in the City of Pineville, was dry at the time of the accident. Sims estimated that Croy was traveling 30 to 35 miles per hour at the time of impact. Sims stated that he had "never seen anybody go that fast around a curve". (Pineville Proffer #1 p. 4 & App. p. 41a) While Sims could not estimate the other vehicle's speed, he repeatedly emphasized that the vehicle was traveling "real real fast". Sims stated that the other vehicle "must have crossed the tracks going real real fast and then tried to cut around the first part of the curve." (Pineville Proffer #1 p. 5) Sims stated that the other driver may have been a person that didn't know the curve. Sims told the investigating officers that he would testify to what he told them in a court of law.(Pineville Proffer #1 p. 5)

Contrary to his statement taken the day after the accident, Sims told a different tale at trial some eight and one-half (8 1/2) years later.

In direct contrast to Sims' statement, the guest passenger of the 1994 Ford Taurus automobile, a thirteen (13) year old girl named Erica Woods, stated on July 20, 1994, that her uncle, Dennis Stephenson, was the driver of the Taurus at the time of its collision with the pickup truck. (Pineville Proffer #1 p. 6) Erica stated that she and her uncle traveled from her home on Hillsdale Drive in Pineville on the way to the Winn Dixie store when the accident happened. (Pineville Proffer #1 p. 7) Erica stated that after they crossed the railroad tracks and went around the curve, they encountered a truck coming towards them with its bright high-beam headlights on, which shocked Dennis Stephenson. (Pineville Proffer #1 p. 8) Erica noted that when Dennis looked shocked, he "started twirling" and the bright lights flicked down, and then the Taurus traveled into the other oncoming lane of traffic. Erica stated that Dennis never lost control of the vehicle and that they were traveling about 30 miles per hour. (Pineville Proffer #1 p. 9) Erica described Dennis "shaking with the steering wheel" once he saw the bright lights, and started to swerve the Taurus, spinning it into the other lane and the "left side in the grass". (Pineville Proffer #1 p. 10-11)

Dennis Stephenson's statement was not taken and properly transcribed until October 12, 1994, by City of Pineville Detective Dana Rachal. Dennis stated that he was driving a 1994 Ford Taurus 4 door automobile registered to Hixson Hopkins Autoplex, in Alexandria, Louisiana. (Pineville Proffer #1 p. 12) Dennis stated that he left his sister, Teresa Ann Gordon's home on 119 Hillsdale in Pineville, traveling to the Piggly Wiggly store on the night of the accident. (Pineville Proffer #1 p. 13) Dennis stated that his place of employment was the Cane River Meat Market in Natchitoches, Louisiana.

Dennis stated that he was traveling out of the curve on Bragg Street when he saw another car coming toward him, in the center of the road, with his high beams on. (Pineville Proffer #1 p. 14) Dennis stated that at all times during the accident he kept his vehicle on the right side of the roadway, and as the other vehicle approached, tried to steer his vehicle over to the right, but that the vehicles had "connect[ed]". Dennis described the rear end of his vehicle as "dancin'" side to side. (Pineville Proffer #1 p. 14) Dennis described the road surface as slippery because it had been raining earlier that day. Dennis estimated his travel speed at 25-30 miles per hour. (Pineville Proffer #1 p. 14-15) Dennis stated that he lost control of his vehicle, and denied ever driving a front wheel-drive vehicle prior to the date of the accident. (Pineville Proffer #1 p. 15) Dennis stated that he tried to steer his vehicle right to avoid the accident, but could not do so because the "car went to dancin' from side to side". Dennis stated that, after the accident, he and his niece tried to go get help, but ran into the officer traveling down Bragg Street, who brought them back to the scene.(Pineville Proffer #1 p. 15)

Pineville Police Officer Clyde Lemmons, a twelve (12) year patrolman for the City of Pineville at the trial, testified that he prepared the motor vehicle accident report which was submitted as Exh. Pineville Proffer #2. (R. Vol. 4 p. 1003) Officer Lemmons indicated in his report that there were no defects in the condition of Bragg Street. Testimony at trial focused on Officer Lemmons preparing a draft motor vehicle accident report in which he checked the box in the section of the accident report designated as "Roadway Condition" indicating "Water on roadway". (Pineville Proffer #2 p. 2 of MVA Report)

Officer Lemmons testified at trial that Exh. P-1 is the final version of his accident report, which indicated

that he did not observe any defects on Bragg Street on the night of the accident, and that the blacktop road was wet, as opposed to finding standing water on the roadway, which he did not encounter. (R. Vol. 4 p. 986-987) Officer Lemmons testified that Dennis Stephenson did not mention to him that the roadway was slippery prior to the crash with Wayne Croy's vehicle during an interview which took place at the scene of the accident shortly after its occurrence. (R. Vol. 4 p. 990) Stephenson told Officer Lemmons on the night of the accident that his 1994 Taurus "fishtailed" when he traveled around the curve on Bragg Street at approximately 40 miles per hour. (R. Vol. 4 p. 991)

Officer Lemmons testified at trial that Stephenson came around the curve on Bragg Street just prior to its intersection with Hickory Drive, and then lost control of his vehicle, crossed the centerline of the roadway into the opposing lane of travel, continued in the opposite lane of travel for approximately 72 feet based on the tire mark data noted, until traveling onto the shoulder of the oncoming lane of travel, when he turned right to attempt to get back onto the roadway and struck the oncoming vehicle driven by Wayne Croy. (R. Vol. 4 p. 994) Officer Lemmons participated in the taking of the statement of Christopher Sims and recalled him discussing Stephenson's speed in the '94 Taurus before impact with the Croy vehicle as "really fast". (R. Vol. 4 p. 995)

Officer Lemmons testified that based on his examination of the roadway he never found any skidmarks on Bragg Street left by the '94 Taurus, but rather observed one 72 foot "tire mark" with a visible pattern of tread on the roadway, where Stephenson traveled on Bragg Street after losing control of his vehicle, traveling off the paved portion and re-entering the paved roadway. (R. Vol. 4 p. 996) Even counsel for

the Croy children admitted that an expert couldn't give an opinion about where a vehicle would have re-entered the paved portion of a roadway from its unpaved shoulder. (R. Vol. 4 p. 995)

Officer Lemmons testified that the photographs of the accident site do not show any obstructions, overhanging limbs or tree branches at or near where the accident took place, or Stephenson's approach to the point of impact. (R. Vol. 4 p. 996 & Exh. P-4 Photos 9, 10 & 11) Officer Lemmons testified that it was his practice while patrolling the streets of the City of Pineville to call in work orders concerning hazardous conditions like missing speed limit signs, but he could not recall if he had ever observed a missing speed limit sign facing Stephenson's travel lane prior to July 18, 1994. (R. Vol. 4 p. 996-997) Officer Lemmons testified that the only motor vehicle accident he ever worked in that area of Bragg Street and its intersection with Hickory Drive was the one between Stephenson and Wayne Croy which occurred on July 18, 1994. (R. Vol. 4 p. 998-999)

Officer Lemmons testified that Stephenson did not tell him about being blinded by bright lights as he came around the curve of Bragg Street, being crowded by bushes on the roadway, encountering light poles too close to the roadway, seeing trees overhanging the road causing a vision obscurement, being surprised by the curve, or not seeing a speed limit sign on the night of the accident. (R. Vol. 4 p. 999-1000) Officer Lemmons specifically did not recall Stephenson offering testimony immediately after the accident about dodging potholes full of water on Bragg Street, which caused him to run off the road. (R. Vol. 4 p. 999) Officer Lemmons further testified that he did not encounter any type of drop off condition on Bragg Street anywhere near where Stephenson left or returned to the paved portion of the

roadway, and if he had, he would have noted this on his accident report. (R. Vol. 4 p. 1000)

Dr. Judson Matthias

Dr. Matthias testified as an Expert in Accident Reconstruction and Traffic Engineering, with a Bachelor of Science degree from the United States Military Academy, a Master or Science degree in Civil Engineering from Morgan State University, and Doctor of Philosophy degree in Civil Engineering from Purdue University. (R. Vol. 7 p. 1673) Dr. Matthias taught traffic engineering, highway design, highway operations and traffic operations at Arizona State University for thirty two (32) years. (R. Vol. 7 p. 1673-1674) Dr. Matthias served in the United States Army for a number of years, and performed private engineering consulting for a number of firms since 1967. (R. Vol. 7 p. 1674) Dr. Matthias belongs to a number of professional societies including the American Society of Civil Engineers, the Institute of Transportation Engineers, the Highway Research Board of the National Academy of Sciences, and the National Society of Professional Engineers. (R. Vol. 7 p. 1674) Dr. Matthias performed consulting work for the Federal government, including Williams Air Force Base and the United States Forestry Service, the State of Arizona and other states and municipalities across the country. (R. Vol. 7 p. 1674-1675)

Dr. Matthias reviewed the photographs taken by Officer Lemmons and Assistant Chief Murdock of the Pineville Police Department of Bragg Street the day of and the day after the accident, the accident report and statements, the depositions of fact witnesses and plaintiffs' expert Duaine Evans. (R. Vol. 7 p. 1677-1678) Dr. Matthias attended trial and viewed the testimony of

plaintiff and defense witnesses, and also visited Bragg Street at night. (R. Vol. 7 p. 1678) Dr. Matthias noted that Bragg Street had been overlaid with asphalt since the July 18, 1994, motor vehicle accident between Stephenson and Wayne Croy. (R. Vol. 7 p. 1677) Dr. Matthias characterized Bragg Street as a collector street having two lanes, made up of two way traffic asphalted concrete, in a rural cross section, having a low volume of traffic proceeding at a low speed, and being a narrow roadway. (R. Vol. 7 p. 1679-1680) A collector street is one that collects traffic from local streets and puts it on major arterial streets. (R. Vol. 7 p. 1680)

The posted speed limit on Bragg Street in 1994 was twenty five (25) miles per hour. (R. Vol. 7 p. 1680) Dr. Matthias testified that the painted centerline stripe on Bragg Street was faded, and there were no edgeline stripes because there was not enough traffic or enough speed to warrant such striping. (R. Vol. 7 p. 1680 & 1688) Dr. Matthias also testified that no curve warning signs were required on Bragg Street because the Manual on Uniform Traffic Control Devices only dictated that curve warning signs should be used if the speed of the curve is equal to or less than the posted speed limit. (R. Vol. 7 p. 1680-1681, Exh. P-17) Dr. Matthias determined that the safe speed to travel on Bragg Street was thirty-five (35) miles per hour, determined through a plane and profile survey performed by a surveyor. (R. Vol. 7 p. 1681, Exh. P-17, Exh. City #3)

Dr. Matthias determined that the roadway started to curve before a driver reached the sharpest part of the curve, called a transition, and that an advanced curve warning sign was strictly prohibited by Manual on Uniform Traffic Control Devices, Section 2(C)5 when the posted speed limit is less than the safe speed that a driver can negotiate the curve, in this case ten (10) miles per

hour. (R. Vol. 7 p. 1683, 1704-1705) Dr. Matthias used the Manual on Uniform Traffic Control Devices for 32 years as a textbook while teaching engineering at Arizona State University. (R. Vol. 7 p. 1704) The Manual requires that advance warning curve signs be placed on roadways when a recommended speed on the curve is greater than 30 miles per hour. (R. Vol. 7 p. 1705) Dr. Matthias testified that if advanced curve warning signs were put on curves like Bragg Street, then drivers get used to the signs, and when they get to a curve where they have to pay attention to the sign, they don't, which is poor engineering and counter-productive. (R. Vol. 7 p. 1683)

Dr. Matthias was aware that Stephenson only had one functioning eye at the time of the accident. (R. Vol. 7 p. 1685) Dr. Matthias testified that the lack of advance curve warning sign, faded centerline and lack of edgeline stripe made no difference to Stephenson in the accident, because he was traveling in excess of fifty (50) miles per hour immediately prior to the accident and when he re-entered the roadway, measured from the point of impact, and the crush impact of the two vehicles. (R. Vol. 7 p. 1685-1686, 1698-1699)

Dr. Matthias noted that Bragg Street was dark and wet when the accident occurred at 10:00 p.m., which probably would have obscured the painted centerline and edgeline, had they been present, or newly painted. (R. Vol. 7 p. 1689) Dr. Matthias noted that there was conflicting evidence about whether there was a 25 mph speed limit sign on Bragg Street facing the direction that Stephenson traveled on the night of the accident, and whether the sign was reflectorized properly. (R. Vol. 7 p. 1688) Dr. Matthias testified that Stephenson's description of his vehicle "fishtailing" was probably the rear end of the '94 Taurus sliding around to the right counter-clockwise, due to his oversteering. (R. Vol. 7 p. 1690) Dr.

Matthias found that in his experience drivers involved in motor vehicle accidents really don't know how fast they are going, or the speed of other drivers, so a close examination of the physical evidence is necessary to determine accurate vehicle speed. (R. Vol. 7 p. 1690)

The physical evidence utilized to determine vehicle speed included the photos depicting the physical damage of the two vehicles, and the skid mark of a vehicle traveling up a hill indicating the distance the '94 Taurus traveled after re-entering Bragg Street. (R. Vol. 7 p. 1691) Stephenson's lone 72 foot skidmark on Bragg Street indicates that one tire locked up as the vehicle re-entered Bragg Street, and that he was traveling in excess of fifty (50) miles per hour. (R. Vol. 7 p. 1693-1694, 1698-1699) Dr. Matthias did not observe any drop off condition on the shoulder of Bragg Street in the photos taken at the time of the accident, which would resemble a railroad tie, nor did the investigating officers note such a condition. (R. Vol. 7 p. 1694-1695) Further, Dr. Matthias testified that he did not observe any "scrubbing" on Bragg Street's edge in the photos, or tires rubbing the roadway edge where it drops off to the shoulder. (R. Vol. 7 p. 1695-1696)

Dr. Matthias did not observe a "yaw" mark on Bragg Street at the time of the accident, which is oversteering induced, and caused by the vehicle traveling one way, leaving a sideways sliding tire mark. (R. Vol. 7 p. 1697) Dr. Matthias testified that tire marks can almost never be placed on a roadway with standing water, because the tire would rest on water rather than the roadway. (R. Vol. 7 p. 1697) It is also unusual to leave tire marks on a wet roadway because there is not enough friction to melt the tire, which leaves a skidmark. (R. Vol. 7 p. 1698)

In response to plaintiffs' expert Duaine Evans's assertion that it was impossible for Stephenson to be

traveling at fifty (50) miles per hour on Bragg Street, Dr. Matthias testified that he had traveled Bragg Street at 50 miles per hour. (R. Vol. 7 p. 1699) In response to Evans' testimony that if Stephenson had been traveling 50 miles per hour, then Bragg Street's shoulder would have been torn up worse, Dr. Matthias testified that he found the shoulder to be a good solid one, and had no idea why Evans would say that. (R. Vol. 7 p. 1699) With the help of the survey performed on Bragg Street, Dr. Matthias determined that Stephenson traveled approximately 180 to 200 feet from the place he came back on the roadway to the point of impact with Wayne Croy's truck, important in calculating Stephenson's speed. (R. Vol. 7 p. 1699-1700)

Dr. Matthias estimated that Wayne Croy had only one to two seconds to react to Stephenson traveling 50 miles per hour straight at him on the night of the accident. (R. Vol. 7 p. 1701) The shoulders and the width of Bragg Street had nothing to do with the accident. (R. Vol. 7 p. 1701) Placing crushed aggregate rock along the edge of Bragg Street was known and acceptable maintenance practice amongst highway engineers. (R. Vol. 7 p. 1702) Dr. Matthias agreed with Evans that overhanging trees or side road bushes had nothing to do with the accident. (R. Vol. 7 p. 1702) Dr. Matthias did not believe Stephenson's testimony that he was blinded by Wayne Croy's bright lights because Croy was at the top of the hill when Stephenson lost control in the bottom curve of the roadway. (R. Vol. 7 p. 1702) Dr. Matthias found the sole cause of the accident to be Stephenson's excessive speed. If he had traveled anywhere near the posted speed of 25 mph, then the accident would not have happened. (R. Vol. 7 p. 1702) Dr. Matthias testified that the speed limit in a city, if not posted, is 25 mph. (R. Vol. 7 p. 1703) Whether the speed limit sign was reflectorized or

not did not influence Stephenson's speed. Maintenance of Bragg Street was not a factor in the cause of the accident between Stephenson and Wayne Croy. (R. Vol. 7 p. 1703)

REASONS FOR GRANTING THE PETITION

The plaintiffs asserted many theories of negligence against the City, including overgrowth of vegetation which obscured the curve, a lack of speed limit sign facing Stephenson, a lack of advance curve warning sign, and a roadway edge drop off condition known by the City that caused Stephenson to cross the center line and strike the Croy vehicle. The trial court did not rely on any expert opinion in finding Bragg Street unreasonably dangerous, but rather relied on the testimony of Paul McLain, former Street Maintenance Department Supervisor for the City, and father of plaintiff, Terry Croy.

(1) The City of Pineville was deprived of its due process rights when brought into the suit nearly three (3) years after the accident occurred.

This Court has repeatedly held that due process is violated when a defendant does not receive adequate notice of suit, and the opportunity to be heard in a timely and meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914) Adequate notice both apprises the individual of the hearing and permits adequate preparation to present objections. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) A party to suit has a right to set a judgment aside because he did not receive proper notice through service, even though he did not have a meritorious defense. *Peralta v.*

Heights Medical Center, Inc., 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988)

Further, the 14th Amendment to the United States Constitution determines whether state substantive law rises to the level of a "legitimate claim of entitlement" protected by the due process clause. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570 (1972) While it is here acknowledged that not every "automobile accident with a state official" rises to the level of a constitutional violation, the failure and/or refusal to name the City as a defendant until nearly three years after the accident, when the plaintiffs allegedly knew of the road defect the day after the accident, constitutes a deprivation that the Fourteenth Amendment surely can address. (*See Parratt v. Taylor*, 451 U.S. 527, 544, 101 S.Ct. 1908, 1917, 68 L.Ed.2d 420 (1981); *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976) overruled in part by *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986))

In the case at bar, plaintiffs argue that Louisiana principles of solidarity allow them to file suit and wait however long they want before naming additional defendants and parties in the suit. In this case, the plaintiffs' decision to wait nearly three years to name the City of Pineville as a defendant prejudiced the City. The City entered an intergovernmental agreement to overlay Bragg Street with asphalt prior to being named a defendant in the suit. Once discovery began, the road was already overlaid, and the City was deprived of an opportunity to have an expert examine Bragg Street in the condition it existed on the night of the accident.

The record indicates that the City was made a defendant for the first time on March 17, 1997, when Sims

amended his petition for damages, after settling his claims against Liberty for $10,000.00 on March 14, 1997. (Sims R. p. 117-122) Liberty experts had examined Bragg Street, and found no defects in the road. The City entered into an intergovernmental agreement with the Rapides Parish Police Jury to overlay and stripe Bragg Street, which took place on April 16, 1997. (Exh. P-14 Depo. Charles Moore) As such, the City never had a chance to have Bragg Street, as it existed on July 18, 1994, examined by an expert of their choosing, and neither did the plaintiffs.

Both the Louisiana and United States Constitution provide that every person shall have an adequate remedy by due process of law and justice. La. Const. Art. 1 Sec. 22, U.S. Const. Art XIV, *Williams v. General Motors Corp.*, 607 So.2d 695 (La. App. 4 Cir. 1992); *Kammerer v. Sewage & Water Board of New Orleans*, 633 So.2d 1357 (La. App. 4 Cir. 1994) Essential to the fabric of the Constitutions is a citizen's right of access to the evidence necessary to prove his case, without which mere access to the courts would be vain and useless. Evidence is the means by which a trier of fact learns the truth of the matter submitted to it for decision. Without competent evidence being put before a trier of fact, the parties have not had a chance to discover, present and impeach evidence and argue their respective theories of the case. Where material evidence is lost, the veracity and justice of the ultimate decision will suffer. Where that evidence has been deliberately withheld or willfully destroyed, then the injuries occur not only to the prejudiced party, but to the justice system itself and the public's confidence in that system. *Kammerer*, 633 So.2d at p. 1361-1362 The plaintiffs, by waiting nearly three years to name the City as a defendant, deprived the City of a "meaningful opportunity to be heard in a reasonable amount of time"

thus violating their due process rights. (*See Armstrong, supra.*)

In the case at bar, no better evidence exists of the City's prejudice than Paul McLain's testimony. McLain testified that he went to the scene of the accident the day after it happened and observed a drop off condition where Stephenson reentered the roadway. This fact was relied on by the trial judge in his Written Reasons for Judgment. (See App. 30a-39a) Based on this sworn testimony, the plaintiffs knew of the alleged defective road condition the day after the accident occurred, but failed to name the City as a defendant until three years later when Bragg Street was overlaid with asphalt. The City never had a chance to examine and test Bragg Street as it existed on the night of the accident.

Clearly the City has been directly prejudiced by the plaintiffs' failure to name them as a defendant, despite their alleged knowledge of the road defect the day after the accident occurred. The City was deprived of their right to conduct engineering tests necessary to substantiate, refute or properly respond to plaintiffs' road hazard allegations. The trial court also refused to grant the City's exceptions of prescription (statute of limitation), despite the plaintiffs' knowledge of the alleged defective condition of Bragg Street as early as July 19, 1994. For these reasons, it is respectfully urged that this Honorable Court recognize the deprivation of the City's due process rights, grant the City's Exception of Prescription, and dismiss all of plaintiffs' claims, with prejudice, at their cost, or remand this matter for a new trial.

A) The alleged Bragg Street drop off condition

McLain initially testified at trial that he found a 4" to 5" drop off condition where Stephenson re-entered the roadway. (R. Vol. 5 p. 1132) McLain allegedly reported this condition to Bobby Mickel, the former City Superintendent of Public Works. (R. Vol. 5 p. 1132-1133) McLain changed his testimony, first believing that Stephenson's tire marks were on the left side of the road where the point of impact occurred, then testified that he was not sure whose tire marks were in the grass, because he "wun't there when it happened". (R. Vol. 5 p. 1137) McLain further stated that he was at the scene of the accident for 15 or 20 minutes the day after it happened, after not sleeping the night before, eight (8) years before the trial of the case, and couldn't say that the tire marks were right at the point of the drop off. (R. Vol. 5 p. 1131 &1137) After being shown the photos of Bragg Street taken by Officer Lemmons and Assistant Chief Murdock the day after the accident, McLain could not say that the tire marks in the photos matched the tire marks he saw, and the alleged drop off condition. (R. Vol. 5 p. 1138) McLain did not measure the alleged drop off condition on Bragg Street, but "just looked at it". (R. Vol. 5 p. 1138) McLain changed his testimony a third time, stating that a drop off condition existed all along the right side of Bragg Street where Stephenson went off the paved roadway, and it varied from 1" to 4". (R. Vol. 5 p. 1138-1139)

McLain's testimony was relied on by the trial court in finding a defective drop off condition on Bragg Street, which served to hold the City 50% liable to the plaintiffs for their alleged damages. (See App. pp. 30a-39a) Ironically, the trial court did not allow into evidence the witness statements taken by the Pineville officers shortly

after the accident, even though the witnesses changed their stories at trial, some eight (8) years later. (R. Vol. 7 p. 1665-1670) Pineville Proffers #1 and #2 are statements taken of Sims, Erica Woods, passenger in the Stephenson vehicle, and Stephenson, shortly after the accident. The statements were presented to Officer Lemmons during the plaintiffs' direct examination to refresh his recollection, but refused admission into evidence. (R. Vol. 4 p. 1003-1004)

Asst. Chief Murdock did not note a drop off condition where Stephenson left the roadway. (R. Vol. 5 p. 1047-1048) Asst. Chief Murdock recalled rainfall in Pineville two hours before the accident, but did not see standing water in potholes on Bragg Street. (R. Vol. 5 p. 1050) Asst. Chief Murdock did not observe running water across Bragg Street on the night of the accident. (R. Vol. 5 p. 1050) Asst. Chief Murdock noticed the 70 to 80 foot tire mark on Bragg Street, that he attributed to Stephenson's vehicle, once it re-entered the roadway, after leaving the paved road in the middle of the curve. (R. Vol. 5 p. 1051-1053)

Superintendent of Public Works Robert "Bobby" Mickels testified that he did not have personal knowledge that the raveling or wash away condition on the edge of Bragg Street existed on the date of the accident. (R. Vol. 5 p. 1102) Mickels testified that the City placed a "hot mix" of gravel and asphalt along Bragg Street's curve edge to prevent a drop off . (R. Vol. 5 p. 1102-1103) Dr. Matthias testified that the Bragg Street photos did not show any "scrubbing", or car tire "rubbing" the edge of the road where it drops off to the shoulder. (R. Vol. 7 p. 1695-1696) Dr. Matthias noted that the Bragg Street photos taken the day after the accident did not show a "yaw" mark, caused by the vehicle traveling one way and the driver over-steering, causing a sideways sliding tire

mark. (R. Vol. 7 p. 1695-1696) Patti Jones Todd, adjuster for Liberty, testified that she went to the scene of the accident the day after it happened, took photos of the scene, and did not find anything to indicate a problem with Bragg Street, or that the City should be made a defendant. (R. Vol. 6 p. 1287)

A political subdivision is not the guarantor of travelers' safety, but rather owes a duty to keep highways reasonably safe for non-negligent motorists. *Tassin v. State Farm*, 96-754 (La. App. 3 Cir. 3/5/97) 692 So.2d 604 In the case at bar, it is clear that no drop off condition existed on Bragg Street at the time Stephenson lost control of his vehicle, crossed the center line of the road, and struck Wayne Croy's vehicle. City maintenance procedures were designed to prevent a drop off condition in the curve and along the shoulders of Bragg Street, and Mickels could not identify a drop off condition the size of a "railroad tie" from the photos taken the day after the accident . It is clear that the City was prejudiced when the plaintiffs failed to name them as a defendant until nearly three years later, and contemporaneous with the asphalt overlay of Bragg Street.

(2) The City of Pineville had no notice of any unreasonably dangerous condition on Bragg Street prior to July 18, 1994.

La. R.S. 9:2800 Limitation of liability for public bodies provides as follows:

> A. A public entity is responsible under Civil Code Article 2317 for damages caused by the condition of buildings within its care and custody.
>
> B. Where other constructions are placed upon

state property by someone other than the state, and the right to keep the improvements on the property has expired, the state shall not be responsible for any damages caused thereby unless the state affirmatively takes control of and utilizes the improvement for the state's benefit and use.

C. Except as provided for in Subsections A and B of this Section, no person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.

D. Constructive notice shall mean the existence of facts which infer actual knowledge.

E. A public entity that responds to or makes an examination or inspection of any public site or area in response to reports or complaints of a defective condition on property of which the entity has no ownership or control and that takes steps to forewarn or alert the public of such defective condition, such as erecting barricades or warning devices in or adjacent to an area, does not thereby gain custody, control, or garde of the area or assume a duty to prevent personal injury, wrongful death, property damage, or other loss as to render the public entity liable unless it is shown

that the entity failed to notify the public entity which does have care and custody of the property of the defect within a reasonable length of time.

F. A violation of the rules and regulations promulgated by a public entity is not negligence per se.

G. (1) "Public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions. Public entity also includes housing authorities, as defined in R.S. 40:384(15), and their commissioners and other officers and employees and sewerage and water boards and their employees, servants, agents, or subcontractors.

(2) "Public site or area" means any publicly owned or common thing, or any privately owned property over which the public's access is not prohibited, limited, or restricted in some manner including those areas of unrestricted access such as streets, sidewalks, parks, or public squares.

La. R.S. 9:2800 requires that claims against public entities can only be actionable if a condition under the entity's control is unreasonably dangerous, and upon a showing of actual or constructive notice of the condition to the entity, and that it had a reasonable opportunity to remedy the

defective condition. *Lee v. State DOTD*, 97-0350 (La. 10/21/97) 701 So.2d 676; *Pierce v. Faucett*, 01-36 (La. App. 5 Cir. 5/30/01) 798 So.2d 155 Therefore, the plaintiff must prove that the thing which caused the damage was in the custody of the defendant, that it was defective, and that the defendant had actual or constructive notice of the defect and failed to take corrective measures within a reasonable time. *Lee, supra.*

In the *Pierce* case, a stop sign located in the City of Kenner was repaired three days before the accident, when it was found knocked down. The Louisiana Fifth Circuit Court of Appeal found that Kenner did not have actual or constructive notice that the sign was down prior to the accident. Much like the case at bar, plaintiffs in the *Pierce* case pointed out that the same stop sign had been downed three times in three months prior to the accident. The Fifth Circuit held that the City of Kenner had neither actual or constructive notice of the downed sign before the accident, despite its history of prior repair. In the case at bar, the Trial Court did not find that Bragg Street was defective due to a missing speed limit sign, but relied on the history of repair to the edge of the roadway as evidence of the City's knowledge of the alleged defect. Further, La. R.S. 9:2800 became effective November 23, 1995, after the July 18, 1994, accident, but prior to the City being made a defendant on March 17, 1997. It is respectfully submitted that the immunity provisions should protect the City, since they were in effect prior to the City being named a defendant in the suit.

CONCLUSION

Stephenson's excessive speed alone killed Wayne Croy and injured Christopher Sims. The maintenance of Bragg Street had nothing to do with one-eyed

Stephenson driving at speeds of twice the posted speed limit on a wet roadway at night. The 25 mile per hour speed limit sign was properly posted and no advanced curve warning sign was necessary on Bragg Street. The City had no notice that Bragg Street was unreasonably dangerous because there had never been another accident like the one that occurred on July 18, 1994.

The City was prejudiced from testing Bragg Street as it existed when the accident occurred, since plaintiffs did not make the City a party until after Bragg Street was overlaid with asphalt in April, 1997. If the plaintiffs' witness Paul McLain is to be believed, then the plaintiffs knew of the alleged drop off condition the day after the July 18, 1994, accident. Failing to name the City as a defendant until Bragg Street was overlaid with asphalt prevented the City from examining and testing it as it existed on the day of the accident. As such, the City's due process rights were violated, because they did not have adequate notice of the alleged defect, and a meaningful and timely opportunity to be heard. No documented evidence of a drop off the size of a railroad tie existed on Bragg Street, based on photos taken the day after the accident.

If Sims had not settled with Liberty on March 14, 1997, the City would never have been made a party on March 17, 1997. It is respectfully requested that this Honorable Court Reverse the decision of the Trial Court, Court of Appeal, and Supreme Court, finding that the City's due process rights have been violated herein.

Respectfully submitted,

RANDALL B. KEISER
KEISER LAW FIRM LLC
P.O. BOX 12358
ALEXANDRIA, LA
(318) 443-6168

STACY C. AUZENNE
Counsel of Record
AUZENNE LAW FIRM,
L.L.C.
P.O. BOX 11817
ALEXANDRIA, LA 71315-1817
(318) 880-0087

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

CA 04-584 consolidated with CA 04-585, CA 04-586

CHRISTOPHER SIMS

VERSUS

LIBERTY MUTUAL INSURANCE CO., ET AL.

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APPEAL FROM THE
NINTH JUDICIAL DISTRICT COURT
PARISH OF RAPIDES, NO. 177,821 C/W
HONORABLE WILLIAM ROSS FOOTE, DISTRICT JUDGE

****

BILLY HOWARD EZELL
JUDGE

****

Court composed of Sylvia R. Cooks, Elizabeth A. Pickett, and Billy Howard Ezell, Judges.

AFFIRMED AS AMENDED.

James A. Bolen, Jr.
Gregory Engelsman
Bolen, Parker, & Brenner, LTD
P. O. Box 11590
Alexandria, LA 71315-1590
(318) 445-8236
Counsel for: Defendants/Appellees
Hixson-Hopkins Autoplex

Liberty Mutual Insurance Company
Roy Seale Halcomb, Jr.
Broussard, Bolton, Halcomb
P. O. Box 1311
Alexandria, LA 71309
(318) 487-4589
Counsel for: Secondary Plaintiffs/Appellants
Brian Croy (in cons. case)
Gerald Alan Croy (in cons. case)
Kathy Stanley (in cons. case)
Twyla Tanner (in cons. case)

Larry Alan Stewart
Staffard, Stewart & Potter

P. O. Box 1711
Alexandria, LA 71301
(318) 487-4910
Counsel for: Defendant/Appellee
Dennis Stephenson

Steven Patrick Mansour
Attorney at Law
P. O. Box 13557
Alexandria, LA 71315
(318) 442-4855
Counsel for: Secondary Plaintiff/Appellant
Christopher Sims

Randall Brian Keiser
Keiser, Auzenne & Boudreaux
P.O. Box 12358
Alexandria, LA 71315-2394
(318) 443-6168
Counsel for: Defendant/Appellant

City of Pineville

W. Jay Luneau
Luneau Law Office
1239 Jackson St.
Alexandria, LA 71301
(318) 767-1161
Counsel for: Secondary Plaintiff/Appellant
Terry M. Croy (in cons. case)

Stacy Christopher Auzenne
Auzenne Law Firm
3600 Jackson Street
Alexandria, LA 71303
(318) 880-0087
Counsel for: Defendant/Appellant
City of Pineville

EZELL, JUDGE.

In this consolidated case, several issues are raised by the parties. The issues pertain to fault, damages, and insurance coverage.

FACTS

On July 18, 1994, at approximately 10:20 p.m., Wayne Croy was driving his Ford Courier pickup truck south on Bragg Street in Pineville, Louisiana. Christopher Sims was a passenger in his truck. They were returning home from Mississippi. At the same time, Dennis Stephenson was driving a Ford Taurus heading north on Bragg Street. His niece, Erica Woods, was a passenger in the

car. As Stephenson traveled along Bragg Street, he came upon a curve to the left. The wheels of the Taurus left the highway and, at some point, the vehicle reentered the highway, crossed the center and collided head-on with the pickup truck. The accident resulted in the death of Wayne Croy and serious injuries to Sims.

Terry Croy, Wayne's wife, filed survival and wrongful death actions. Wayne's four major children, Gerald Allen Croy, Kathy Stanley, Twyla Tanner, and Bryan Croy, also filed a wrongful death action. Sims filed suit for his injuries. Made defendants were the City of Pineville; Stephenson; his automobile liability insurer, Liberty Mutual Insurance Company; the owner of the Taurus, Hixson-Hopkins Autoplex of Alexandria; and Connie Lewis, the man who rented the vehicle from Hixson-Hopkins. The Plaintiffs alleged that the cause of the collision was the substandard condition of the roadway and the negligence of Stephenson.

The three separate suits were consolidated in the trial court. A bench trial was held on December 3 - 6, 2002. The trial court found the City of Pineville and Stephenson each fifty percent at fault for the accident. The claims against Hixson-Hopkins and Lewis were dismissed, and Liberty Mutual's coverage was limited to $10,000.00 per person, $20,000.00 per accident. The City, Terry Croy, the Croy children, and Sims appealed the judgment. Croy also answered the appeal.

There are some preliminary matters that have been raised by the City.

Therefore, we will address those issues first.

DUE PROCESS

The City claims that it was deprived of its due process rights when brought into the suit nearly three years after the accident. The suits were originally filed in September and December of 1994. The City was made a defendant for the first time when Sims amended his petition for damages on March 14, 1997. The City claims that it was prejudiced because it entered into an intergovernmental agreement with the Rapides Parish Police Jury to overlay and stripe Bragg Street, which occurred on April 16, 1997, thereby, denying it the chance to have the street examined by an expert of its choosing as it existed at the time of the accident. The City filed applications for writs with this court and the supreme court when the trial court originally denied its exception of prescription in 1997.

"Review of an issue previously addressed by an appellate court is generally precluded by the law of the case doctrine." *Desselle v. LaFleur*, 03-562, p. 3 (La.App. 3 Cir. 2/4/04), 865 So.2d 954, 956. "This doctrine not only applies to those decisions of an appellate court that arise from the full appeal process but to all decisions of an appellate court, including decisions on writ applications." *Id.*
"However, the law of the case doctrine does not absolutely bar this court from reconsidering its prior decisions; rather it is discretionary." *Id.*
None of the facts since the previous rulings by this court and the supreme court on the earlier writ applications have changed. Even it they had, we note that the supreme court has held that there is no due process violation under the Louisiana Constitution or the United States Constitution because "[i]nterruption of

prescription for solidary obligors is rationally related to the state's interest in providing full compensation to tort victims and holding defendants responsible for their delicts."
Picone v. Lyons, 601 So.2d 1375, 1377 (La.1992).

EXPERT TESTIMONY

Duaine Evans, a consulting engineer, testified on behalf of Plaintiffs as a traffic engineering and accident reconstruction expert. The City claims that his testimony should have been excluded because it strayed from known and accepted engineering standards. At the trial court level the City sought to exclude Evans' testimony because "he picks and chooses which factual testimony to rely on and reject in formulating his conclusion that Bragg Street in Pineville was defective at the time of the accident, July 18,1994."

Louisiana Code of Evidence Article 702 provides for the admission of expert testimony as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "A district court is accorded broad discretion in determining whether expert testimony should be held admissible and who should or should not be permitted to testify as an expert."
Cheairs v. State, Dep't of Transp. and Dev., 03-680, p. 6 (La. 12/3/03), 861 So.2d 536, 541. "A district court's decision to qualify an expert will not be overturned absent an abuse of discretion." *Id.*

The City cites *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999), in support of its argument that Evans' methodology strayed from accepted standards. However, other than informing us what was the improper methodology, the City simply complains about the facts that Evans utilized in his conclusions. "'As a general rule, the factual basis for an expert's opinion goes to the credibility of the testimony, not its admissibility, and it is up to the opposing party to examine the factual basis of the opinion in cross-examination.'" *Amoco Prod. Co. v. Texaco, Inc.*, 02-240, p. 26 (La.App. 3 Cir. 1/29/03), 838 So.2d 821, 839 *writs denied*, 03-1[illegible], 03-1104 (La. 6/6/03) 845 So.2d 1096, (*quoting Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8 Cir. 1988)). Therefore, we find that the trial court properly admitted Evans' testimony.

STATEMENTS

The City also claims that the trial court erred in not allowing the introduction of the parties statements taken by the city police. It claims that these statements are admissible as both business records of the city police department and because they were used to refresh a witness's recollection, specifically Officer Clyde Lemmons.

The City wanted to introduce the statements of Sims, Stephenson, and Erica Woods, the passenger in the Stephenson vehicle.

These statements are obviously hearsay. La.Code Evid. art. 801(C). The City argues that the statements are admissible pursuant to Louisiana Code of Evidence Article 612(A) (writing used to refresh memory) and Louisiana Code of Evidence Article 803(6) (records of

regularly conducted business activity).

We have reviewed Officer Lemmons' testimony referenced by the City in its brief and find that he was only asked if he took a statement from Sims. He never reviewed the statement nor testified about its contents. He did not use Sims' statement to refresh his memory. Furthermore, there is no reference to Woods' or Stephenson's statements.

Regarding the business records exception, Article 803(6) specifically provides that "[p]ublic records and reports which are specifically excluded from the public records exception by Article 803(8)(b) shall not qualify as an exception to the hearsay rule under this Paragraph." Article 803(8)(b)(i) provides that "[i]nvestigative reports by police and other law enforcement personnel" are excluded from the public records and reports exception to the hearsay rule.

Clearly, these statements were part of the police investigation of the accident.

The trial court did not err in excluding these statements.

NOTICE

The City claims that it had no notice of an unreasonably dangerous condition on Bragg Street as required by Louisiana Revised Statutes 9:2800. However, in *Jacobs v. City of Bunkie*, 98-2510 (La. 5/18/99), 737 So.2d 14, the supreme court held that the notice requirements of Louisiana Revised Statutes 9:2800 cannot be applied retroactively to causes of actior which arose before the effective date of November 23, 1995, shared with the constitutional amendment to Article XII, § 10(C), which allowed the legislature to limit the liability of the state. *See also Bozeman v. State, La. Dep't of Transp. and Dev.*, 34,430 (La.App. 2 Cir. 4/4/01), 787 So.2d 357, *writ denied*,

01-1341 (La. 6/29/01), 794 So.2d 813.

This accident occurred on July 18, 1994. Therefore, the notice requirements of Louisiana Revised Statutes 9:2800 are not applicable to this case.

LIABILITY

The City claims that the trial court erred in assessing it with any liability based on the defective condition of Bragg Street. It claims that it was Stephenson's excessive speed alone which was the cause of the accident. It is the City's contention that neither the maintenance, design, nor the condition of Bragg Street contributed in any manner to the occurrence of the accident.

In an action asserting liability as the result of a defective condition based on Louisiana Civil Code Article 2317 before 1996, the plaintiff had to prove three elements:

"(1) that the thing which caused the damages was in the care, custody, and control (garde) of the defendant; (2) that the thing had a vice, ruin, or defect that presented an unreasonable risk of harm; and (3) that the vice, ruin, or defect was the cause-in-fact of the plaintiff's damages." *Dupree v. City of New Orleans*, 99-3651, p. 5 (La. 8/31/00), 765 So.2d 1002, 1008.

"Whether a risk is unreasonable is 'a matter wed to the facts' and must be determined in light of the facts and surrounding circumstances of each particular case." *Id.* at 1012 (*quoting Celestine v. Union Oil Co. of Calif.*, 94-1868, p. 9 (La. 4/10/95), 652 So.2d 1299, 1304). "The custodian is absolved from his strict liability neither by his ignorance of the defect or vice, nor by circumstances that the defect could not easily be detected." *Id.*

Factors to be considered and weighed in determining whether a thing presents an unreasonable risk of harm

are: "(1) the claims and interests of the parties; (2) the probability of the risk occurring; (3) the gravity of the consequences; (4) the burden of adequate precautions; (5) individual and societal rights and obligations; and (6) the social utility involved." *Id.*

In assessing liability, the trial court found that "[t]he combination of the drift off of the pavement in the curve, the corrective action and the drop off resulted in an inability to maintain control and the car crossed into the oncoming lane striking the Croy vehicle." While there was eyewitness and expert testimony concerning the placement of a speed limit sign apprising Stephenson on the speed, this obviously did not factor into the trial court's decision. There was also expert testimony as to the need for an advanced curve warning sign. However, this, too, did not factor into the trial court's decision to assess the City with fault. The drop-off on the road is what the trial court found presented an unreasonable risk of harm.

Officer Russell L. Murdock, assistant chief of police with the Pineville police department, was on duty the evening of the accident and participated in the investigation. Officer Murdock testified that the tire tracks were visible in the grass on the right-hand shoulder. He explained that tire tracks started where the curve began and continued around the curve. In his previous deposition testimony, Officer Murdock stated that there was a three-to-four inch drop where the tires came back on the asphalt. Officer Murdock agreed that there was a problem with cars going off the edge of the road on this left-hand curve on Bragg Street when going faster than the speed limit. He explained that the shoulder was continually being built up because rainwater kept washing it away.

Paul McLain worked as the street department supervisor

for the City for ten years. He is also Terry Croy's stepfather. McLain testified that for thirty-six years he lived about a mile-and-a-half from Bragg Street. He stated that people kept running off the side of the road in the curve so the City would have to put aggregate and asphalt in the area. McLain went to the scene of the accident the day after it occurred and observed a four-to-five inch drop-off where the Stephenson vehicle reentered the road.

Duaine Evans explained that drivers are more apt to run off the roadway when encountering a left-hand curve that is hidden, such as this one which was at the bottom of a hill. He testified that this creates a situation for a rut or drop-off. Evans testified that it is obvious that Stephenson had some control of the vehicle when his wheels were off the curve because the tracks followed the contour of the curve. He stated that the amount of drop-off that was observed by the witnesses would cause steering problems. As Evans later stated, a three-to-four inch drop-off is a hazardous condition. Evans explained that a drop-off in a curve poses a greater hazard because more people are exposed to it more often since they tend to run off the road in this area. He opined that when Stephenson hit the drop-off is when the trouble began.

Evans admitted that it was a good practice of the City to place material on the edge to fill the drop-off. However, he believed that a different material should have obviously been used since there continued to be a problem and a need to place material in that area.

Dr. Judson Matthias, a civil engineer who testified on behalf of the City, while disagreeing that there was a drop-off, agreed that a drop-off on the outside of a lefthand curve can be very dangerous because if a person steers too much, the vehicle will go clear across the road.

In deposition testimony, Matthias admitted that a dropoff could be a contributing cause of Stephenson coming back on the road at a sharp angle and shooting across the road. There were no measurements of the drop-off taken by anyone. There were two witnesses who offered the observations of the level of the drop-off. The trial court found their testimony to be credible. While Matthias testified that he did not observe the drop-off in the pictures taken the day after the accident, Evans indicated that he could see a drop-off.

An abrupt drop-off between a roadway and a shoulder constitutes a defect. *LeBlanc v. State, Department of Highways*, 419 So.2d 853 (La.1982). An implicit necessity for the use of a shoulder is a connection between the roadway and the shoulder that allows for safe, gradual movement from one to the other. *Sinitiere v. Lavergne*, 391 So.2d 821 (La.1980). *Mathieu v. State, Dep't of Transp. and Dev.*, 598 So.2d 676, 679 (La.App. 3 Cir.), *writ denied*, 600 So.2d 665 (La.1992).

An appellate court will not disturb a trial court's factual findings unless there is a showing of manifest error. *Id.* Based on the evidence we have previously discussed, we cannot say the trial court erred in finding that the drop-off located in the left-hand curve on Bragg Street was unreasonably dangerous and a cause of the accident.

DAMAGES

The trial court awarded the following damages:
Gerald Croy $40,000.00 wrongful death damages
Kathy Croy $40,000.00 wrongful death damages
Twyla Croy $40,000.00 wrongful death damages
Brian Croy $125,000.00 wrongful death damages
Terry Croy $100,000.00 survival action damages
$125,000.00 wrongful death damages

$156,494.00 past and future lost wages
$100.00 for loss of the pickup truck
$3,894.35 funeral expenses
Christopher Sims $32,018.43 past medical expenses
$75,000.00 future medical expenses
$650,000.00 general damages

The City claims that the damages awarded to Terry Croy, the Croy children, and Sims were excessive and should be reduced. On the other hand, Kathy, Twyla, and Gerald Croy claim that the award of $40,000.00 to each of them for the wrongful death of their father should be increased to $70,000.00 each. Terry Croy also claims that both the $100,000.00 awarded for the survival action of Wayne Croy and the award of $125,000.00 to her for wrongful death damages should be increased.

In *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La.1993), *cert. denied*, 510 U.S. 1114, 114 S.Ct. 1059 (1994), the Louisiana Supreme Court explained the standard for appellate review of a trial court's general damages award:

[T]he discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award.

Terry Croy's Damages

Survival and Wrongful Death Damages

The City argues that the damage award of $100,000.00 for

Terry's survival action based on Wayne's pain and suffering and $125,000.00 for her own wrongful death damages are excessive. Contrarily, Terry argues that the awards are unreasonably low.

[T]he survival action and the wrongful death action are two separate and distinct causes of action that arise at different times, address themselves to the recovery of damages for different injuries and losses, and accrue to different tort victims. The survival action comes into existence simultaneously with the tort, permits recovery only for the damages suffered by the victim from the time of injury to the moment of death, and is transmitted to the victim's beneficiaries upon his death.

Conversely, the wrongful death action arises only if and when the victim dies and compensates the beneficiaries for their own individual injuries that occur at the moment of the victim's death and thereafter.

Boullt v. State Farm Mut. Auto. Ins. Co., 99-942, p. 8 (La. 10/19/99), 752 So.2d 739, 743-44 (citations omitted).

"The survival action in a suit resulting from the death of a tort victim includes recovery for pain and suffering, loss of earnings and other damages sustained by the victim up to the moment of death. Damages for pain and suffering are properly awarded if there is a scintilla of evidence of any pre-death pain or suffering by the victim."

Mathieu, 598 So.2d at 681.

The accident happened around 10:32 p.m. During the time before Wayne's death, there is no doubt that Wayne was conscious and suffered tremendously.

Officer Lemmons testified that Wayne was definitely conscious and complaining of chest pain when he arrived at the scene of the accident.

As further explained by Officer Murdock, Wayne was pinned between the steering wheel and the seat because

the front end was crushed. The fire department had to remove him with the jaws of life. Officer Murdock testified that Wayne was coherent and had labored breathing. It was Officer Murdock's observation that Wayne's chest was crushed because he was in deep pain and moaning and groaning.

Dr. Wesley Dyer, a family practitioner who treated Wayne at the hospital, stated that Wayne was alert to person and place. He explained that Wayne had multiple lacerations to the head, face, left hand, and both knees, and broken bones in the left wrist, right hip, right knee. Dr. Dyer further commented that the hip injury consisted of the head of the bone penetrating through the socket into the pelvis. Dr. Dyer explained that the injuries would cause severe and substantial pain until the Code Blue at 11:45 p.m. when Wayne crashed.

Based on this evidence we cannot say that the trial court abused its discretion in its award of $100,000.00 as survival action damages. While Wayne suffered tremendously, it is clear that the suffering lasted only a little over an hour.

"Elements of damage for wrongful death are loss of love and affection, loss of services, loss of support, medical expenses and funeral expenses. Damages for wrongful death are intended to compensate the victim's beneficiaries for their compensable injuries following the victim's moment of death." *Id.* Separate awards were made for loss of wages and funeral expenses, so we will review the evidence indicating that Terry suffered a loss of love and affection, services, and incurred medical expenses as a result of Wayne's death.

Terry and Wayne were married in July 1989. She was thirty-three years old at the time. Terry admitted that she and Wayne did have marital problems at times, but

explained that this was mostly at the beginning of the marriage. Terry testified that Wayne was her best friend. Terry explained that Wayne helped her with housework and she helped him with yard work. She testified that she still misses her husband today and that the first year without him was very hard. Wayne's kids acknowledged that Terry and Wayne loved one another. McLain, Terry's stepfather, confirmed that Terry had problems for a year or longer following her husband's death.

There was also evidence that medical expenses for Wayne's care the night of his death totaled $3,086.29. Based on this evidence, we cannot say that the award of $125,000.00 for wrongful death damages was an abuse of discretion.

Economic Damages

Terry was awarded a total of $156,494.00 for past and future lost wages. The City claims that this award is unsupported by the record.

"Damages for loss of past wages are not necessarily limited to a multiplier of the amount earned at the time of injury." *Callihan v. Town of Vinton*, 95-665, p. 7 (La.App. 3 Cir. 12/6/95), 668 So.2d 735, 741. "It can be computed on the amount the plaintiff would in all probability have been earning at the time of trial." *Id.*

"It is well established that a loss of future earnings award is not merely based upon the difference between a plaintiff's earnings before and after a disabling injury. Such an award is predicted upon the difference between the plaintiff's earning capacity before and after the disabling injury." Id.

Awards for loss of future income or future earning capacity are inherently speculative and insusceptible of calculation with mathematical certainty. The factors to be considered in determining future loss of income includes

the plaintiff's physical condition before and after his injury, his past work record and the consistency thereof, the amount the plaintiff probably would have earned absent the injury complained of, and the probability that he would have continued to earn wages over the balance of his working life.

Id.

Terry had two daughters who lived with them. While Terry worked part-time as a substitute cook for the Rapides Parish School Board, it was Wayne that provided for the family. Terry testified that Wayne did work for a cab company six days a week. Several witnesses confirmed that Wayne worked for the cab company and even did some mechanic work at home on the side.

Terry testified that Wayne's employment with the cab company ended a few days before his death. As explained by Terry, Wayne would have had to continue working because there was no money to retire on since he did not have any type of retirement plan. Sims supported Terry's testimony stating that Wayne always had a job. At the time of the accident, Wayne and Sims were returning from Mississippi where Wayne was helping Sims with his business of painting reflective house numbers on the curb.

Dr. William Culbertson, an economist, calculated Wayne's loss of earnings. He concluded that at the time of his death, Wayne had eleven-and-eighttenths years of estimated work life remaining, at which time he would have been seventy years old. In computing loss of wages, Dr. Culbertson did not have the benefit of tax returns but was told by Wayne's family that he worked for a cab company earning $50 to $75 a day. Dr. Culbertson testified that he reviewed Terry's deposition and understood that Wayne had a falling out with the cab company, but he was also under the impression that there was an understanding that Wayne was to be hired back

again. He took into consideration that Wayne worked six days a week.

Dr. Culbertson did not include any income for the mechanical work that Wayne performed because there was no clear indication as to how much Wayne earned. Dr. Culbertson performed three different calculations based on earnings of $50 a day, $75 a day, and minimum wage. Earning $50 a day at six days a week, Dr. Culbertson concluded that the total loss for past and future economic loss was $156,494.00. This is obviously the basis for the trial court's award.

Dr. Culbertson also took into account that Wayne would have used some of this income on himself and included a deduction of $46,833.00 for personal consumption.

We find that the evidence supports awarding loss of wages at $50 a day for six days a week and affirm the trial court's award.

Croy Children Damages

Except for Brian, the Croy children were awarded $40,000 each for wrongful death damages. Brian was awarded $125,000. The City claims these awards to Wayne's adult children are excessive. The three Croy children, Kathy, Twyla, and Gerald, argue that the awards to them should be increased.

Except for Gerald, all the children lived near their father and saw him on a regular basis. Gerald lived in Georgia but kept in touch with his father. The children agreed that their relationship with their father was distant when their parents divorced. However, they testified that, after several years, their relationship with their father became better than it was before. The girls saw their father on a regular basis, and Gerald kept in touch with his father by telephone and visiting several times a year. They talked about the loss in their lives with their father's death and

their disappointment that their young children would never know their grandfather. Terry confirmed that Wayne was close with his children.

Testimony revealed that Brian is mentally handicapped and the loss of his father has devastated him. When Wayne was alive, Brian would see his father every day because he lived across the street from his grandmother, Wayne's mother, who was still living when Wayne died. Brian testified that he has not gotten over his father's death.

While we find that these awards for wrongful death damages may be a little on the high side, we cannot say that the trial court abused its discretion.

Christopher Sims' Damages

The City argues that the awards of $75,000 for future medical expenses and $650,000 in general damages are unsupported by the evidence. Sims filed an appeal but did not request any relief in his brief.

The dash of the truck caved in on Sims. The jaws of life were used to remove him from the vehicle. He explained that there was a great deal of pain when he was pulled out the truck, with excruciating pain in the hip area.

While Sims may have survived the accident, he suffered severe injuries. The deposition of Dr. John Fritchie, an orthopedic surgeon who treated Sims at Huey P. Long Hospital, was introduced into evidence. At the time of trial, Dr. Fritchie was deceased. When Sims was admitted into the emergency room, he was diagnosed with several injuries, including: (1) pneumomediastinum, air leaking into an area within the chest cavity where the heart is located, (2) right mid-shaft femur fracture, (3) right talus fracture (one of the bones in the foot making up the ankle joint), (4) left posterior hip dislocation, (5) left femoral head fracture, (6) left patella tendon laceration, and (7)

lacerations to the chin and right knee. Dr. Fritchie testified that these injuries were very severe and life-threatening.

While in the emergency room, a closed reduction on the left hip was performed to restore blood supply to the hip. Dr. Fritchie explained that Sims' hip dislocation was precipitated by a traumatic event causing the ball to come out of the socket. The next day, July 20, 1999, a closed reduction and intramedullary rodding of the right femur fracture was performed on Sims. During this time, an open reduction internal fixation of the right talus fracture as well as an open repair of the patella tendon laceration of the left knee were also performed. Several days later, on August 1, 1999, an open reduction internal fixation of the left femoral head fracture was performed on Sims. This procedure was required because the ball of the ball-andsocket joint was fractured and it required better placement with screws.

While in the hospital Sims had some seizures. Sims testified that he continues to have seizures and memory loss today. Sims was in the hospital for three to four weeks. When he returned home, he was in bed for three to four months and then progressed to a wheelchair. During this time he had to use a bedpan and then a bottle for urination while in the wheelchair. Sims remained in the wheelchair for four or five months and then began using crutches. He could not do normal activities in excess of a year and had frequent headaches which have decreased. This caused depression. He explained that he now has six-inch incisions on both sides of his buttocks, scars on his knee, chin, and right ankle. He continues to have pain in his hip, knees and ankle.

Dr. Fritchie had not seen Sims since he assisted with the surgery to repair his hip, so he did not want to offer an opinion as to Sims' disability without seeing him again.

Since Dr. Fritchie died, Sims was examined by Dr. Walter Foster, also an orthopedic surgeon. Dr. Foster testified that Sims' injuries were severe and lifethreatening at the time of the accident. Dr. Foster stated that Sims will have future pain and discomfort as a result of the injuries.

Dr. Foster ordered x-rays and noted traumatic osteoarthritis of the left hip. It was Dr. Foster's opinion that Sims will need a total hip replacement at young age, probably in about ten years. Usually, a hip replacement is not attempted until age sixty. Dr. Foster explained that Sims would be on crutches for at least six weeks after surgery and would need physical therapy. He also stated that there is a risk for dislocation during the first three months. He testified that the cost of hip replacement surgery would be $25,000.00 to $30,000.00.

Dr. Foster also testified that, in a perfect world, the hip replacement would have a fifteen-year life span. Due to Sims' young age, he will probably need more than one replacement. Sims was only twenty-one years old at the time of the accident. Dr. Foster explained that each hip replacement becomes more significant and costs will go up on subsequent procedures.

Dr. Foster also opined that the rod in the right femur needs to removed because of the risk of infection. This is day-type surgery which would cost $5,000.00 to $6,000.00 There is no doubt that Sims' injuries were very serious, have affected his life, and will continue to affect his life. We cannot say the trial court abused its discretion in its award of general damages to Sims.

This court in *Veazey v. State Farm Mut. Auto Ins.*, 587 So.2d 5, 8 (La.App. 3 Cir. 1991)(citations omitted), discussed the burden of proof required to support an award for future medical expenses: Future medical expenses, like any other damages, must be established with some degree of certainty. The plaintiff must show

that, more probably than not, these expenses will be incurred. Awards will not be made in the absence of medical testimony that they are indicated and setting out their probable cost. An award for future medical expenses cannot be based on mere speculation of the jury. Much stronger proof, such as medical testimony of the specific expenses to arise, should be required for such an award. Through Dr. Foster's testimony, there was ample medical evidence of the need for future hip replacements for Sims. Dr. Foster was also very specific about the costs and the fact that the costs would be higher with each successive surgery. Dr. Foster also indicated that the rod in Sims' leg needed to be removed and was very specific about these costs. We find no error in the trial court's award of future medical expenses to Sims.

INSURANCE COVERAGE

The Croy children and Terry argue that the trial court erred in finding that the Liberty Mutual insurance policy had limits of $10,000.00 per person, $20,000.00 per accident as opposed to $100,000.00 per person, $300,000.00 per accident.

The facts at trial indicated that Hixson-Hopkins rented cars under the Ford Rent-a-Car System with Liberty Mutual providing the insurance. Normally, the policies provided liability coverage of $100,000.00/$300,000.00. However, certain rental agreements have "cut-back" endorsements. Liberty Mutual argued that the rental agreement covering the Ford Taurus had a cut-back

endorsement providing liability coverage of $10,000.00/$20,000.00/$10,000.00. A rental agreement for the Ford Taurus was introduced into evidence which was signed by Connie Lewis, as the customer. The agreement covered the time period of June 24, 1994 to July 24, 1994.

At trial it was explained that the rental was month-to-month. Under the "vehicle Insurance" section the policy provides:

Licensee provides liability insurance coverage for persons using the vehicle with the permission of the Licensee as provided for in Paragraph 1 hereof (and not otherwise) in accordance with the provisions of an automobile liability insurance policy with limits equal to the minimum requirements of any applicable state financial responsibility law or other similar law or statute.

In finding that the lower limits of liability applied as provided by the rental agreement, the trial court analogized the testimony surrounding the signing of the rental agreement and stated in written reasons (emphasis in original):

Plaintiff's [sic] effort to reform the contract to a long-term lease and avoid the clear language of the contract rests primarily on the testimony of Connie Lewis. Mr. Lewis's testimony was not only **not** credible, it bordered on incredible. Mr. Lewis's felony conviction arose from a multi-million dollar money-laundering scheme involving Lewis Meats, a company in which he seemed to claim an ownership interest when convenient. This company paid the high monthly rental payments for the car at a time when the criminal activity was apparently running rampant. Mr. Lewis testified he thought this was a lease with a million dollars of insurance. He based this belief on a conversation with a prior employee of a predecessor corporation that occurred several years before the rental

agreement at issue today. No corroborating evidence was produced. Even if the Court believed such a conversation happened and a different agreement existed in the 1980's, the contract for this car was clearly a monthly rental with clear language.

The only thing the Court finds credible in Mr. Lewis's testimony is that he would just sign when he got a new car and pay when they billed him monthly. He took full advantage of their (sic) being no limit to mileage, no maintenance costs and the ability to trade out different cars for shorter periods. Expense did not seem to be an issue since the payments were made by Lewis Meats, his vehicle for money laundering. A lack of extensive documentation in such a set up is understandable. Having examined the testimony and evidence the Court finds the agreement to be a Minimum Limits Rental Contract. But for Liberty's admitting coverage, with all the facts presented, this Court would find the contract clearly excluded coverage for Mr. Stephenson.

Liberty, for some reason, paid the stated policy limits of $10,000.00.

Plaintiffs argue that is a waiver of a coverage defense and seek to impose the higher limits they allege were available to Hixson. Liberty provided Hixson with insurance in several layers. They could offer rental customers a Standard Limits ($100,000/$300,000) or a Minimum Limits ($10,000). Hixson was also a named insured for an excess policy of $10,000,000.00 [sic, $1,000,000.00]. These were policies to Hixson.

The excess is clearly not available to the person renting the car. This would be coverage for Hixson for its actions. Even with coverage extended to Stephenson the Standard Limit Contract is not mandated. The Court finds Lewis did not have a direct contractual relationship

with Liberty. Hixson had no obligation to extend the upper limits. Testimony clearly showed it never did. Their standard procedure was to provide Minimum Limits Contracts only.

What the predecessor corporation had done is irrelevant.

Even a credible witness would not have created a verbal contract binding Hixson, a successor corporation, and altering the series of consistent written agreements. Mr. Lewis routinely entered the same agreement with Hixson. The conspiracy theory of backdating and resigning agreements is not proved by a preponderance of the evidence. The issue is **"what contract was in existence at the time of the accident?"**

Accepting that the long-term use of rental cars was unorthodox application does not change the nature of several years of continued renewals of the Minimum Limits Contract with Hixson. With the exception of Mr. Lewis's testimony, which the Court finds completely unbelievable, nothing suggests any other agreement with Hixson to have ever existed.

On appeal the Plaintiffs have argued that the trial court erred in finding that Liberty Mutual did not waive a "coverage defense" of the $10,000.00/$20,000.00 liability limit because it did not notify Stephenson of the "cut-back" agreement. They claim that Liberty Mutual should have obtained a nonwaiver agreement to reserve the defense.

In *Lindsey v. Colonial Lloyd's Ins. Co.*, 595 So.2d 606 (La.1992), the supreme court discussed an insurance policy arrangement similar to the one involved in the present case. It recognized that there is "nothing repugnant to public policy or the insurance code in the 'two tier' insurance created by the combined policy and rental agreement." *Id.* at 607 (footnote omitted). The supreme court found that pursuant to the rental agreement, the insured agreed to be bound to the rental agreement's lower limits of coverage. *Also see Pitts v. Pickens*, 94-1811 (La.App. 1 Cir. 5/5/95), 655 So.2d 520, *writ denied*, 95-1895 (La. 11/13/95), 662 So.2d 469.

Lewis, and in turn Stephenson as his permissive driver,

agreed to the terms of the rental agreement. In this case, Liberty Mutual issued an insurance policy to Ford Motor Company who in turn issued a rental agreement through its agent, Hixson-Hopkins, to Connie Lewis. Lewis signed the rental agreement which contained a section on the front entitled "WARNING" right above Lewis's signature. This section stated: "ONLY MINIMUM LIABILITY INSURANCE IS PROVIDED AS STATED ON THE REVERSE SIDE." As we have previously recited, the reverse side of the rental agreement provided for minimum liability insurance.

There was no need to notify Stephenson of that which was contained in the policy. Furthermore, policy limits are not a defense to coverage. Policy limits define the amount of coverage. As explained in 2 ERIC MILLS HOLMES ET AL., APPLEMAN ON INSURANCE, 2D § 8.1, at 302 (1996)(footnotes omitted), [T]he rules of waiver and estoppel can not be used to expand coverage that is specifically and unambigously excluded by the policy language.

The position is strongly favored since to extend coverage through the use of the doctrine of waiver or estoppel will essentially rewrite the contract entered into by the parties. Thus, the doctrines should only be used to remove the insurer's ability to rely on certain exclusions, limitations or conditions but not to add new insuring agreements to the policy.

In other words to expand coverage to $100,000.00/$300,000.00 "would be a windfall, unforseen and totally outside the contemplation of all the parties . . . ."

Lindsey, 595 So.2d at 614. Also see *Gambino v. Lamulle*, 97-2798 (La.App. 4 Cir. 6/10/98), 715 So.2d 574, where the fourth circuit held that a waiver argument was not available because the dispute was over the amount of

coverage and not a policy defense that could be waived.

PENALTIES

The Croy children and Terry further claim that the trial court erred in not assessing penalties against Liberty Mutual because it took the position that Stephenson was not covered by the policy. As is apparent from the previously quoted trial court's reasons for judgment, the trial court indicated its own determination that Stephenson was not covered under the Liberty Mutual Policy.

In *Dennison v. Liberty Mut. Ins. Co.*, 94-26 (La.App. 1 Cir. 11/10/94), 645 So.2d 1227, the first circuit found that coverage in a Liberty Mutual policy did not extend to the driver of a rented vehicle who was not listed as an additional driver under the terms of the rental agreement. The Liberty Mutual policy at issue contained the same provisions regarding covered drivers as the present case, which restricted insurance coverage to those persons named in the rental agreement as drivers. Only C.S. Lewis and Jason Lewis were listed as drivers on the rental agreement.

Therefore, there would have been no coverage for Stephenson based on the reasoning in *Dennison*. We agree with the trial court that Liberty Mutual did not misrepresent its coverage under the policy and could legitimately question its coverage concerning Stephenson.

COURT COSTS

The Croy children complain that they were assessed with the deposition costs of Sue Wennihan, corporate representative of Hixson-Hopkins; Lee Brading, corporate representative of Liberty Mutual; Michael

Pisari, another corporate representative of Liberty Mutual; and Charles Moore, head of the Department of Public Works for the City of Pineville. The Croy children argue that it was an abuse of discretion to order Plaintiffs to pay the costs of taking these depositions.

Louisiana Code of Civil Procedure Article 1920 provides, in pertinent part, that "the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable." The trial court's great discretion in assessing court costs will not be reversed absent an abuse of that discretion. *Frazier v. Zapata Protein USA, Inc.*, 02-605 (La.App. 3 Cir. 12/11/02), 832 So.2d 1141, *writs denied*, 03-126, 03-145, (La. 3/21/03), 840 So.2d 537, 539. While the party cast with court costs is generally the party found liable, we cannot say the trial court abused its discretion in assessing the Plaintiffs with the costs of the Hixson-Hopkins deposition and Liberty Mutual depositions since they failed to succeed on the higher policy limits issue. However, we do find that it was an abuse of discretion to cast Plaintiffs with the costs of the City employee's deposition. We therefore, reverse that part of judgment.

In their appeal, the Croy children have also raised an error of the trial court in including only $9,330.90 as the total amount of court costs. They claim plaintiffs offered into evidence itemized bills of the clerk of court for each of the three consolidated cases which, added together, total $16,905.90.

Pursuant to Louisiana Revised Statutes 13:5112, an award of court costs against a political subdivision of the State shall be expressed "in a dollar amount in a judgment of the trial court or decree of the appellate court." It is apparent from the trial court's reasons for judgment that it intended to assess all costs, other than the deposition

costs discussed above, against the City and Liberty Mutual equally.

Therefore, we will enter judgment in this court in a sum certain of all court costs in the trial court and this court in the amount of $27,091.50 to be divided equally between the City and Liberty Mutual as the trial court did.

In accordance with the foregoing discussion, we reverse the trial court's assessment of the cost of Charles Moore's deposition and assess that cost to the City of Pineville. Costs in the trial court and of this appeal in the amount of $27,031.11 are to be divided equally between the City of Pineville and Liberty Mutual.

AFFIRMED AS AMENDED.

CIVIL SUIT NO. 178,614
TERRY M. CROY, ET AL
VS.
LIBERTY MUTUAL INSURANCE CO., ET AL

consolidated with

CIVIL SUIT NO. 177,821
CHRISTOPHER SIMS
VS.
LIBERTY MUTUAL INSURANCE CO., ET AL

consolidated with

CIVIL SUIT NO. 177,831
GERALD ALAN CROY, ET AL
VS.
LIBERTY MUTUAL INSURANCE CO., ET AL

REASONS FOR JUDGMENT

Mr. Connie Lewis rented a car from Hixson Autoplex and placed it under the control of an employee of Lewis Meats. He authorized Dennis Stephenson to drive it. Mr. Stephenson was driving the car when it collided with the car driven by Mr. Wayne Croy and carrying Christopher Sims as a passenger. The collision resulted in Mr. Coy's death and injury to Mr. Sims. Suit was brought against the driver; Hixson Hopkins AutoPlex; Liberty Mutual Insurance; the City of Pineville; and Connie and Patsy Lewis. Cross-claims, Consolidations, Third Party Demands and extensive Motion practice ensued. At issue remains causation of the accident, liability apportionment, damages and insurance coverage.

The Court addresses coverage first. The two questions for trial deal the nature of the rental/lease agreement, and the extent of coverage limits. Liberty Mutual (Liberty) insured Hixson Hopkins AutoPlex (Hixson) for rental vehicles. The policy in question clearly excludes drivers in Mr. Stephenson's category since he was not named in the agreement. Summary Judgment was denied on more than one occasion due to factual allegations that the Connie Lewis rental was really a long-term lease agreement and not a short-term rental. A Question of fact as to the exact nature of the contract was found to exist. This could address both coverage and limits. Liberty admitted coverage so that examination now deals only with limits.

Plaintiff's effort to reform the contract to a long-term lease and avoid the clear language of the contract rests primarily on the testimony of Connie Lewis. Mr. Lewis's testimony was not only not credible, it bordered on incredible. Mr. Lewis's felony conviction arose from a multi-million dollar money-laundering scheme involving Lewis Meats, a company in which he seemed to claim an ownership interest when convenient. This company paid the high monthly rental payments for the car at a time when the criminal activity was apparently running rampant. Mr. Lewis testified he thought this was a lease with a million dollars of insurance. He based this belief on a conversation with a prior employee of a predecessor corporation that occurred several years before the rental agreement at issue today. No corroborating evidence was produced. Even if the Court believed such a conversation happened and a different agreement existed in the 1980's, the contract for this car was clearly a monthly rental with clear language.

The only thing the Court finds credible in Mr. Lewis's testimony is that he would just sign when he got a new car and pay when they billed him monthly. He took full advantage of their being no limit to mileage, no maintenance costs and the ability to trade out different cars for shorter periods. Expense did not seem to be an issue since the payments were made by Lewis Meats, is vehicle for money laundering. A lack of extensive documentation in such a set up is understandable. Having examined the testimony and evidence the Court finds the agreement to be a Minimum Limits Rental Contract. But for Liberty's admitting coverage, with all the facts presented, this Court would find the contract clearly excluded coverage for Mr. Stephenson.

Liberty, for some reason, paid the stated policy limits of $10,000.00. Plaintiffs argue that is a waiver of a coverage defense and seek to impose the higher limits they allege were available to Hixson. Liberty provided Hixson with insurance in several layers. They could offer rental customers a Standard Limits $100,000/300,000) or a Minimum Limits ($10,000). Hixson was also a named insured for an excess policy of $10,000,000.00. These were policies to Hixson. The excess is clearly not available to the person renting the car. This would be coverage for Hixson for its actions.

Even with coverage extended to Stephenson the Standard Limit Contract is not mandated. The Court finds Lewis did not have a direct contractual relationship with Liberty. Hixson had no obligation to extend the upper limits. Testimony clearly showed it never did. Their standard procedure was to provide Minimum Limits Contracts only. What the predecessor corporation had done is irrelevant. Even a credible witness would not

have created a verbal contract binding Hixson, a successor corporation, and altering the series of consistent written agreements. Mr. Lewis routinely entered the same agreement with Hixson. The conspiracy theory of backdating and resigning agreements is not proved by a preponderance of the evidence. The issue is "what contract was in existence at the time of the accident?" Accepting that the long-term use of rental cars was an unorthodox application does not change the nature of several years of continued renewals of the Minimum Limits Contract with Hixson. Mr. Lewis's payment sources were also unorthodox. With the exception of Mr. Lewis's testimony, which the Court finds completely unbelievable, nothing suggests any other agreement with Hixson to have ever existed.

Hixson made the decision to not offer higher limits. That is a business decision they may make and the fact that other coverage was available for them to offer grants no greater expectation to their customer. Accordingly, the Court finds the $10,000.00 to have been paid. The Court finds no actions of Hixson Hopkins that give rise to liability. Plaintiff's claims against Hixson Hopkins Autoplex and Liberty Mutual are dismissed. Claims for penalties under LSA 22:658 and 22:1220 are also denied.

Connie and Patsy Lewis were named as Defendants, due to vicarious liability. Subsequent pleadings refer to their dismissal, yet the Court finds no judgment releasing them. The Court finds no evidence establishing liability and therefore dismisses any claims that may still be pending against Connie Lewis and Patsy Lewis.

The accident was caused by Mr. Stephenson losing control of his car, crossing the centerline and running head on

into the Croy vehicle approaching from the other direction. The loss of control arose from a combination of lack of familiarity with the road, configuration of the curve, defects in the shoulder and speed of Mr. Stephenson's car.

The accident occurred on Bragg Street, a city street of Pineville that appears more like a rural country road. There was no improved shoulder on the road or visible edge striping. The City knew of the propensity for Bragg Street to wash out the shoulder of the road in that area. There was a washed out area at the bottom of the hill in the curve at the time of the accident.

After much testimony concerning signage, striping, speed, surface conditions and shrubbery, the Court has a clear appreciation of what happened. Mr. Stephenson was traveling north at approximately 10:25 PM when he encountered a downhill slope with a left hand unbanked curve at the bottom of the hill. The Court finds Mr. Stephenson was unfamiliar with the road. The Court also finds there was a lack of sufficient signs to alert an unfamiliar driver of the road configuration at the bottom of the slope. Signs and road surface have been changed since the accident.

Mr. Stephenson, through surprise, inadvertence or excessive speed, left the paved portion of the roadway with the right wheels of his car as he entered the curve. In an effort to correct he steered to the left to reenter the paved surface. The point of reentry had a drop of between pavement and shoulder of at least three inches. Paul McClain, a credible witness, observed the road that night and placed the drop off at four to five inches at the point of reentry.

The transition back on to the roadway was not smooth. Mr. Sims remembers the approaching Stephenson vehicle's headlights bouncing before jerking to the left and heading straight at them. This is consistent with a vehicle trying to overcome a significant elevation difference when returning to a paved roadway. The tire marks in the grass showed no sudden change of direction. The sudden lurching to the left occurred at the point of the tires reentering to roadway. The combination of the drift off of the pavement in the curve, the corrective action and the drop off resulted in an inability to maintain control and the car crossed into the oncoming lane striking the Croy vehicle. This combination of causative facts results in liability being shared equally between Mr. Stephenson and the City of Pineville. Accordingly the Court apportions fault in the amount of 50% to each.

Next we turn to damages. This was an extremely violent head on collision. Mr. Wayne Croy the driver of the Courier pickup truck, was pinned in the vehicle after suffering massive chest injuries. He was conscious at the scene complaining of pain. Officer Murdock characterized his condition as one of deep pain. Extraction equipment was used to remove him from the vehicle and he left the scene of the accident by ambulance approximately 30 minutes after the collision. He was alert at the hospital. He continued to complain of pain showing signs of head injury, lacerations, chest injury and knee abrasions. His condition deteriorated rapidly and he died at 12:59 AM, approximately two and on half hours afer the collision. There is no record of pain medication being administered and the Court awards $100,000.00 for the pain and suffering experienced by Mr. Croy.

Mr. Croy was apparently a hard worker who provided for

his family. Even though he went through periods of differing employment and often worked on a cash basis for side jobs, the Court finds he generally maintained some form of paying employment. The Court accepts Dr. Culbertson's reasoning over that of Dan Cliff and finds the $50.00 per day values to be appropriate. While Mr. Croy certainly made more than that on some days, this offsets the periodic episodes between jobs. Accepting the $50.00 per day average and the life tables Dr. Culbertson used, the Court awards $156,494.00 for the economic loss including all past and future lost wages.

Terry Croy was devastated by the loss of her husband. The Court finds a close and loving relationship and dismisses the attempts to characterize the marriage as one of a series of separations. Loving relationships often encounter disagreements and fights and occasional day long cooling off periods does not undermine the bond found to exist between Terry and Wayne Croy. The Court awards Terry Croy $125,000 for the wrongful death of her husband.

The major children Kathy Stanley, Twyla Tanner and Gerald Croy all had a good relationship with their father. While some saw him more than others, they each seemed to benefit from the relationship with their father and turned to him for advice and guidance, even as adults. The Court awards $40,000.00 to each for the wrongful death of their father.

Brian Croy shared a closer, and more dependent, relationship than the other children. Brian was a special education student with some mental and emotional limitations. He lived next door to his father, saw him daily, and clearly depended on him for his emotional

grounding. The Court was impressed by his testimony, as well as his sibling's testimony about the devastation and lack of understanding of his father's death. Brian's dependence on his father's presence and obvious difficulty in coping with the grieving process creates a much greater loss than the other major children. The Court awards Brian Croy $125,000.00 for the wrongful death of his father.

Property damage was stipulated to be $100.00 and remaining special damages are $3,894.35.

Christopher Sims suffered multiple injuries. As the passenger in a small utility truck involved in a crushing head on collision he was pinned against the crumpled dashboard with severe knee and hip injury. His injuries include pneum. mediatinum (air in the tissue around the aorta and heart), a right mid-shaft femur fracture, right talus fracture, left posterior hip dislocation, left femoral head fracture, deep laceration of the patella, laceration to the right knee, laceration to the chin and a concussion.

The combination of leg, hip and head injuries made treatment difficult and painful. Only light pain medication could be used when the left hip was forced back into position. Mr. Sims remembers the procedure and he had to be physically restrained by several people. He underwent closed reduction and IM rodding of the right femur fracture. Later there was an open reduction of the right talus fracture and of the left femoral head fracture. The Fifth surgical procedure was to remove the hardware and box wire the kneecap.

Mr. Sims was physically disabled for a year after the accident, spending three months in the hospital, four to

five months in a wheel chair and then graduated to crutches. He suffered continuous severe headaches and depressior due to the confinement. Mr. Sims still suffers residual and permanent problems. The talus injury exacerbates the hip limitation, changes in weather result in aches and pains, the headaches while diminished in frequency still occur two to three times a week. His memory is still affected and employment is limited to working for himself painting street number signs when he can. At age 29 he shows traumatic arthritis and faces at least two future hip replacements. In addition to the structural problems Mr. Sims has visible scarring on his chin, both knees and ankle. The Court finds his cognitive functions to have been diminished and believes Mr. Sims description of his mental limitation will remain a permanent condition. The accident clearly affected Mr. Sims ability to maintain a normal life.

Dr. Stan Foster explained the need for hip replacement, its durability and the increase difficulty with subsequent surgeries. Due to his age, Mr. Sims faces at least two future hip surgeries and a possible third if it is medically possible. In addition to the expense is the substantial pain anticipated with such surgeries.

The court finds significant and excruciating pain at time of the accident and in the series of surgical procedures that followed. The Court further finds significant past and future loss of enjoyment of life. The Court awards $32,018.43 for past medicals, $75,000.00 for future medicals and $650,000.00 in general damages.

Accordingly, the Court finds liability to be assessed against the Defendants Dennis Stephenson and the City of Pineville in the amount of 50% each and awards

damages to the Petitioners in the amounts listed above. The Court further awards all legal interest and costs.

Rendered and signed this 6 day of May, 2003.

W. ROSS FOOTE, JUDGE
Division "D"

Sent To:
Mr. W. Jay Luneau
1239 Jackson Street
Alexandria, LA 71301

Mr. Steven P. Mansour
P. O. Box 13557
Alexandria, LA 71315

Mr. Roy Halcomb, Jr.
P. O. Box 1311
Alexandria, LA 71301

Mr. Gregory Engelsman
P. O. Box 906
Alexandria, LA 71315

Mr. Larry A. Stewart
P. O. Box 1711
Alexandria, LA 71301

Mr. Randall B. Keiser
P. O. Drawer 12394
Alexandria, LA 71315-2394
Mr. William B. Allen
P. O. Box 13557
Alexandria, LA 71315

THE SUPREME COURT OF THE STATE OF LOUISIANA

CHRISTOPHER SIMS

VS. NO. 2005-C-0863

LIBERTY MUTUAL INSURANCE CO., ET AL.

IN RE: Pineville City of; - Defendant; Applying for Writ of Certiorari and/or Review, Parish of Rapides, 9th Judicial District Court Div. D, Nos. 178,614, 177,821, 177,831; to the Court of Appeal, Third Circuit, No(s). CA 04-584, CA 04-585, CA 04-586

May 13, 2005

Denied.

PFC

Sims stated that he and his cousin were traveling toward Wayne Street, away from Louisiana Highway 107, at about 10:00 p.m.,coming around the double curve headed toward the railroad tracks, when they first encountered a car traveling "real real fast" that went off the road on his side, and then jerked the wheel over straight in front of them, and slammed on his brakes. *(Pineville Proffer #1 p. 2)*

Sims did not see anything in the roadway that would have made the other vehicle go off the roadway, except that the driver "was going so fast he had to take both lanes" to come around the curve.*(Pineville Proffer #1 p. 3)*

Sims stated that the road conditions were fair, with no shoulders, but that would not have created a problem if the other driver had been traveling the speed he should have been going. *(Pineville Proffer #1 p. 4)*

Sims stated that the road, Bragg Street in the City of Pineville, was dry at the time of the accident. Sims estimated that Croy was traveling 30 to 35 miles per hour at the time of impact. Sims stated that he had "never seen anybody go that fast around a curve". *(Pineville Proffer #1 p. 4)*